No. 123

In the Supreme Court of the United States

OCTOBER TERM, 1945

CARL B. WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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OPINIONS BELOW

The majority (R. 41–46) and dissenting (R. 46–47) opinions in the circuit court of appeals are not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered March 30, 1945 (R. 47), and a petition for rehearing was denied May 14, 1945 (R. 48). The petition for a writ of certiorari was filed June 11, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13,

1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Within an Indian Reservation over which the United States has exclusive jurisdiction, petitioner had carnal knowledge of an Indian girl over sixteen but under eighteen years of age. Section 279 of the Criminal Code makes it an offense carnally to know a girl under the age of sixteen years. The question presented is whether, by virtue of the assimilative crimes act (Section 289 of the Criminal Code), petitioner committed the offense of statutory rape as defined by § 43–4901 of the Arizona Code, which fixes the age of consent at eighteen years.

STATUTES INVOLVED

Section 272 of the Criminal Code (18 U. S. C. 451, Chap. 11) provides in part:

> The crimes and offenses defined in this chapter shall be punished as herein prescribed:
>
> * * * * *
>
> Third. When committed within or on any lands reserved or acquired for the use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall

be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

Section 279 of the Criminal Code (18 U. S. C. 458, Chap. 11) provides:

> Whoever shall carnally and unlawfully know any female under the age of sixteen years, or shall be accessory to such carnal and unlawful knowledge before the fact, shall for a first offense, be imprisoned not more than fifteen years, and for a subsequent offense be imprisoned not more than thirty years.

Section 289 of the Criminal Code, commonly known as the assimilative crimes act (18 U. S. C. 468), provides:

> Whoever, within the territorial limits of any State, organized Territory, or district, but within or upon any of the places now existing or hereafter reserved or acquired, described [in section 272 of the Criminal Code] shall do or omit the doing of any act or thing which is not made penal by any laws of Congress, but which if committed or omitted within the jurisdiction of the State, Territory, or district in which such place is situated, by the laws thereof in force on February 1, 1940, and remaining in force at the time of the doing or omitting the doing of such act or thing, would be penal, shall be deemed guilty of a like offense and be subject to a like punishment.

Section 43–4901 of the Arizona Code, 1939, provides in part:

> * * * Rape is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under any of the following circumstances:
>
> Where the female is under the age of eighteen [18] years;
>
> * * * * *
>
> * * * Rape is punishable by imprisonment in the state prison for life or for any term of years not less than five [5].

STATEMENT

On March 23, 1944, petitioner was indicted in the United States District Court for the District of Arizona in one count charging that on December 10, 1943, within the limits of the Colorado Indian Reservation in the District of Arizona, he carnally knew Geraldine Rose Ameelyenah, a female Indian who was under the age of eighteen years and who was not his wife (R. 2–3). Petitioner was convicted after a jury trial (R. 4) and was sentenced to imprisonment for a term of five years (R. 12–13). Upon appeal to the Circuit Court of Appeals for the Ninth Circuit, the judgment was affirmed, one judge dissenting (R. 41–47).

The evidence in support of the conviction, the sufficiency of which petitioner does not dispute, may be briefly summarized as follows:

Petitioner is a member of the Caucasian race. He was born in 1898 and is married and has a son thirteen years of age. (R. 26–27.) Geraldine Rose Ameelyenah is a Mohave Indian who lives on the Colorado Indian Reservation in Arizona. She became sixteen years of age on August 8, 1943. (R. 23–24.) Petitioner established a Nazarene Church on the reservation and he "did missionary work as a Nazarene preacher" (R. 23–24). Geraldine was his assistant in publishing the church newspaper (R. 24). On the evening of December 3, 1943, after they had worked on the newspaper, petitioner drove Geraldine in his pick-up truck to an isolated side road, and while they were parked there, she submitted to sexual intercourse with him (R. 25).

DISCUSSION

The assimilative crimes act (Section 289 of the Criminal Code, *supra*) provides that within defined areas of exclusive federal jurisdiction,[1] any person who does an act "which is not made penal by any laws of Congress," but which would be a violation of the law of the state if it had jurisdiction, shall be deemed to have committed the offense described by state law and shall be punished as

[1] By virtue of 25 U. S. C. 217 the general laws of the United States relating to the punishment of crimes committed in any place within its exclusive jurisdiction are extended to "the Indian country." An Indian Reservation is a part of the Indian country. *Donnelly* v. *United States*, 228 U. S. 243, 269.

provided by the state law. It is undisputed that petitioner's misconduct occurred in an area within federal jurisdiction and that, since Geraldine was under 18 years of age, it would have been a violation of Arizona law if it had occurred within the state's jurisdiction. The sole question presented, therefore, is whether carnally knowing a girl over 16 but under 18 years of age is an "act * * * which is not made penal by any laws of Congress," as is required by the assimilative crimes act. This problem stems from the fact that Section 279 of the Criminal Code makes it a penal offense "carnally and unlawfully [to] know any female under the age of sixteen years." It is petitioner's view that Congress has made the act of carnally knowing a girl of tender years a crime and that, in defining the offense, it has fixed the age of consent at sixteen years. He argues, therefore, and the dissenting judge below agreed, that there is no room in this case for resort to the Arizona definition of statutory rape pursuant to the assimilative crimes act. The majority of the court below accepted the view urged in that court by the Government, that since the act of carnally knowing a girl over 16 but under 18 years of age is not made penal by any law of Congress, the assimilative crimes act is applicable and petitioner therefore committed a federal offense as defined by § 43–4901 of the Arizona Code.

To our knowledge, the question presented is one of first impression. While there are decisions un-

der the assimilative crimes act (*infra*, p. 8), none reaches the problem presented by this case. In our view, the conflicting views of the majority and dissenting opinions in the court below reflect a difference in emphasis upon the considerations which control the resolution of the question presented.

a. The argument in support of the view of the Government in the court below and of the majority of that court rests upon a literal reading of the assimilative crimes act coupled with a recognition of its underlying policy (see *infra*, p. 11, fn. 8) that, where feasible, it is desirable for the federal government to accommodate its policy in defining crimes to that of the state within whose exterior boundaries federal jurisdiction is to be exercised. The argument runs as follows: The act of carnally knowing a girl over sixteen but under eighteen years of age is not made penal by any law of Congress. Accordingly, the assimilative crimes act is applicable and reference may be had to state law to determine whether such an act is proscribed by the state. In this case, since petitioner's misconduct would have constituted a state offense if it had occurred within an area of state jurisdiction, it is desirable to recognize the policy of the state and to enforce it in areas of federal jurisdiction within the confines of the state. Such a conclusion obviates the anomaly of an act committed in the state of Arizona being criminal or innocent depending upon whether it took place on

one side of the boundary line of the Indian Reservation or the other. This does not mean that the congressional policy underlying Section 279 of the Criminal Code is disregarded. Rather, it means that Congress has set the age of sixteen as the minimum, but not the maximum, age of consent for all areas of federal jurisdiction, regardless of whether any particular state may have fixed a lower age. In cases, such as this one, where the girl is over the age of sixteen, the higher age fixed by state law applies. As is evident, this view draws its strength from the fact that it minimizes the area of possible conflict between the policies of the federal and the state governments, without departing from the fair meaning of the language of the assimilative crimes act.

b. The considerations which detract from the soundness of the decision of the court below stem principally from the legislative history of the assimilative crimes act, which is discussed in *Franklin* v. *United States*, 216 U. S. 559, and *United States* v. *Press Publishing Co.*, 219 U. S. 1, and in the dissenting opinion in *Johnson* v. *Yellow Cab Co.*, 321 U. S. 383, 398–400. Briefly summarized, that history reveals that the legislation in question had its origin in the Act of March 3, 1825 (4 Stat. 115). That act was entitled, "An Act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes." Sections 1 and 2 provided for the punishment of arson and Section 3,

which was the precursor of the present assimilative crimes act, provided:

> *And be it further enacted* That, if any offence[2] shall be committed in any of the places aforesaid, the punishment of which offence is not specially provided for by any law of the United States, such offence shall, upon a conviction in any court of the United States having cognizance thereof, be liable to, and receive the same punishment as the laws of the state in which such fort, dock-yard, navy-yard, arsenal, armory, or magazine, or other place, ceded as aforesaid, is situated, provide for the like offence when committed within the body of any county of such state.

The remaining sections defined various offenses which it was apparently believed occurred with some frequency in the areas of federal jurisdiction enumerated in the Act. The discussions of the act in Congress indicate that its purpose was to provide for the punishment of acts committed in such areas, which therefore could not be punished by the states and which, if not prosecuted by the federal government, would go unpunished. See Gales & Seaton, Vol. I, pp. 154, 157–158.

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[2] The use of the term "offence" was abandoned when the Criminal Code was enacted, because, in the words of the House Report, "an act which is not forbidden by law and to the commission of which no penalty is attached in no legal sense can be denominated an 'offense.' The section has therefore been rewritten so as to correctly express what Congress intended when it enacted the section referred to." H. Rep. No. 2, Part 1, p. 25 (Section 286), 60th Cong., 1st sess.

Webster, who sponsored the legislation, explained the purpose of Section 3 of the act as follows (Gales & Seaton, Vol. I, p. 338):

> As to the third section, it must be obvious, that, where the jurisdiction of a small place, containing only a few hundreds of people, (a navy yard for instance,) was ceded to the United States, some provision was required for the punishment of offences; and as, from the use to which the place was to be put, some crimes were likely to be more frequently committed than others, the committee had thought it sufficient to provide for these, and then to leave the residue to be punished by the laws of the state in which the yard, &c. might be. He [Webster] was persuaded that the people would not view it as any hardship, that the great class of minor offences should continue to be punished in the same manner as they had been before the cession.

It is fairly evident from Webster's comments that he anticipated that Section 3 of the act of 1825 would come into play in respect of those crimes concerning which Congress did not undertake to legislate specifically. In the words of this Court (*Franklin* v. *United States,* 216 U. S. 559, 568), "by this act [Section 3 of the Act of March 3, 1825] Congress adopted for the government of the designated places, under the exclusive jurisdiction and control of the United States, the criminal laws then existing in the several States within which such places were situated, in so far

as said laws were not displaced by specific laws enacted by Congress."[2] For example, Congress having dealt with the subject of arson in Sections

[2] In *United States* v. *Press Publishing Co.*, 219 U. S. 1, 9–10, this Court characterized the assimilative crimes act, as follows:

"It is certain, on the face of the quoted section, that it exclusively relates to offenses committed on United States reservations, etc., which are 'not provided for by any law of the United States,' and that as to such offenses the state law, when they are by that law defined and punished, is adopted and made applicable. That is to say, while the statute leaves no doubt where acts are done on reservations which are expressly prohibited and punished as crimes by a law of the United States, that law is dominant and controlling, yet, on the other hand, where no law of the United States has expressly provided for the punishment of offenses committed on reservations, all acts done on such reservations which are made criminal by the laws of the several States are left to be punished under the applicable state statutes. When these results of the statute are borne in mind it becomes manifest that Congress, in adopting it, sedulously considered the twofold character of our constitutional government, and had in view the enlightened purpose, so far as the punishment of crime was concerned, to interfere as little as might be with the authority of the States on that subject over all territory situated within their exterior boundaries, and which hence would be subject to exclusive state jurisdiction but for the existence of a United States reservation. In accomplishing these purposes it is apparent that the statute, instead of fixing by its own terms the punishment for crimes committed on such reservations which were not previously provided for by a law of the United States, adopted and wrote in the state law, with the single difference that the offense, although punished as an offense against the United States, was nevertheless punishable only in the way and to the extent that it would have been punishable if the territory embraced by the reservation remained subject to the jurisdiction of the States. * * * "

1 and 2 of the act, it is doubtful that Congress intended Section 3 to have application in any case of arson, even if the arson did not fall within the congressional definition of the crime. Taking this approach, it is argued by petitioner and by the dissenting judge in the court below that Congress has addressed itself to the subject of the carnal abuse of girls of tender years and has expressed its policy by its definition of the offense, fixing the age of consent at sixteen years. Since Congress has enacted a law making penal the act of carnal knowledge, the assimilative crimes act, it is argued, may not be used to depart from the congressional definition of the offense.

c. The legislative history of Section 279 of the Criminal Code, which originated in the Act of February 9, 1889, c. 120, 25 Stat. 658, and which fixed the age of consent at sixteen years, sheds no light on the issue present in this case. It shows that there was some question as to whether the age of consent should be fixed at 14 or 16 years and that the latter age was eventually agreed upon. Cong. Rec., 50th Cong., 2d sess., p. 997. But there is no indication that any consideration was given to the relationship of the proposed legislation to the assimilative crimes act.[4]

[4] We are unable to agree with petitioner's suggestion (Pet. 26–44) that Section 328 of the Criminal Code (18 U. S. C. 548), which relates to offenses by Indians, when construed in the light of *United States* v. *Chavez*, 290 U. S. 357, may possibly apply to his case. The *Chavez* case was concerned

CONCLUSION

While the decision of the circuit court of appeals may be supported on the grounds discussed at pp. 7–8, *supra,* the considerations militating against the validity of the decision are such that we do not feel warranted in opposing granting of the petition for a writ of certiorari.

Respectfully submitted.

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with the question whether the federal government possessed jurisdiction to punish larceny by a non-Indian in certain Indian Country. Since Section 287 of the Criminal Code (18 U. S. C. 466) proscribes larcency by any person in areas of federal jurisdiction and the land in question was found to be such an area, the Court concluded that jurisdiction existed. The case was not concerned with a construction of Section 328 of the Criminal Code, which is expressly limited to crimes by Indians. Since petitioner is not an Indian (R. 27), it is plain that Section 328 is inapplicable to this case.

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